Supreme Court, U.S.
FILED
JAN 13 1999
OFFICE OF THE CLERK

No. 98-964

IN THE

Supreme Court of the United States

October Term, 1998

DILAWAR M. EDWARDS, Ph.D.,

Petitioner,

v.

CALIFORNIA UNIVERSITY OF PENNSYLVANIA; JOHN PIERCE WATKINS, Ph.D., President; NANCY Z. NELSON, Ed.D., Vice President for Academic Affairs; WILLIAM BENEDETTI, Ed.D., Dean in their official capacities; DAVID CAMPBELL, Chairperson, Educational Studies Dept.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* INTERCOLLEGIATE STUDIES INSTITUTE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the First Amendment permit a government university to censor a tenured professor's in-class comments and suggested reading materials offered in the course of interacting with university-approved curriculum based solely upon their viewpoint?

2. Does a professor at a public university, which operates under a collective bargaining agreement that guarantees academic freedom, to its faculty, speak as the government or as an individual when making in-class comments and offering suggested out-of-class reading material while interacting with university-approved curriculum?

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INTERESTS OF AMICUS CURIAE[1]

The Intercollegiate Studies Institute (ISI) is a non-profit, non-partisan, tax-exempt educational organization whose purpose is to convey to successive generations of college youth a better understanding of the values and institutions that sustain a free society. This purpose is advanced by a recognition that college campuses must be free from ideological discrimination. To that end, ISI articulates and defends the ideas of a free society, in particular the concept of academic freedom, on America's college campuses. Through an integrated program of lectures, conferences, publications, and fellowships, the ISI annually works with hundreds of thousands of students and faculty from coast to coast.

ISI is concerned that the lower court's opinion retards the evolution of traditional academic freedom. ISI believes that this represents a threat to our aims and to our respected institutions of higher education. Most importantly, it threatens the students who, as leaders of the next generation, must be adequately equipped to deal with the innumerable challenges they will face. ISI is convinced that the shaping of these minds must continue to take place in a forum open to an extensive collection of viewpoints.

ISI requests this Court to grant the Petition For Writ Of Certiorari and examine the standard enunciated by the court of appeals. Upon review, ISI urges the Court to reverse the decision of the appeals court, and restore academic freedom the protection it has traditionally enjoyed under the First Amendment.

SUMMARY OF THE ARGUMENT

Amici strongly endorse the concept of academic freedom put forth in the petition for certiorari. Amici are concerned,

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[1] Pursuant to Rule 37.6 of this Court, *amicus* hereby states that this brief was authored entirely by counsel for Amicus Curiae Intercollegiate Studies Institute. No person or entity other than amicus curiae made a contribution to the preparation or submission of this brief. Pursuant to Rule37.3(a), both parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

however, with the test applied by the Third Circuit to Petitioner's in-class comments and suggested extracurricular reading materials. The test adopted by the court of appeals lowers individual speech in the classroom, and by extension the concept of academic freedom, to an unprecedented level. While amici acknowledge the need for universities to retain discretion in curriculum decisions, the protections advanced by Petitioner does not infringe upon, nor implicate a university's right to determine the contours of the curriculum, or the methods by which it is taught.

This case presents an opportunity for this Court to answer two distinct, yet interrelated, questions regarding academic freedom at the University level. First, amici contend that, while a university has broad discretion in hiring decisions, what classes will be offered, reviewing syllabi of courses, and monitoring teaching methods, this discretion does not extend to censoring a professor's comments and supplemental reading materials on topics that the professor and the University have deemed not only relevant, but also integral to the course.

Such a regime flies in the face of both the First Amendment and the concept of academic freedom that this Court has espoused. Guidance is necessary for the courts below in order to clarify that while the government may determine the contours of curriculum, a professor's interaction with the curriculum within those contours is protected under the First Amendment.

Alternatively, this case provides an opportunity for this Court to determine whether a professor's in-class speech and suggested reading is government speech when the University has adopted a collective bargaining agreement which specifically guarantees that each professor is "entitled to freedom in the classroom in discussing their subject," and "should make every effort to indicate that they are not speaking for the university." Amici contends the collective bargaining agreement clarifies the nature of the classroom and the status of the speaker as under the protective umbrella of the First Amendment.

Based upon the University's clear intent to promote a diversity of views, and its specific policy as expressed in the

collective bargaining agreement that professors do not speak for the university, this Court need only decide that when public universities have clear policies establishing the freedom of professors teaching their subject, the professor enjoys First Amendment protection for in-class curriculum-related comments and suggested supplemental out-of-class reading materials.

If American universities are to continue as the preeminent marketplaces of ideas, professors must be free to interact with students and curriculum without fear that expression of a disfavored viewpoint may result in sanction or dismissal. The theory of academic freedom envisioned by the Respondent and validated by the Third Circuit would permit the government to cast a "pall of orthodoxy" over university classrooms, and in the process, inflict grave injury to the marketplace of ideas.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PERMIT A GOVERNMENT UNIVERSITY TO SUPPRESS A PROFESSOR'S SPEECH MADE IN THE COURSE OF INTERACTING WITH STUDENTS AND CURRICULUM BASED SOLELY UPON THE VIEWPOINT OF THE SPEECH.

A. The Third Circuit was incorrect in its holding that any academic freedom rights protected by the First Amendment are exclusively enjoyed by the University.

This Court has held that academic freedom is a "special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). According to the Third Circuit, however, the First Amendment does not apply to a professor's in-class comments or suggested reading materials relevant to topics within university-approved curriculum.[2] If this

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[2] Throughout this brief amici refer to Dr. Edwards' "in-class comments" and "suggested reading materials" offered within "university-approved curriculum." There is nothing in the record to argue that the comments made by Petitioner were not relevant to the course or that the subject matter being discussed was "in contravention of school policy or dictates." *See* Petition for

view is correct, the concept of academic freedom only extends to the institution and not to individual professors.[3] Under this approach academic freedom under the First Amendment is only concerned with the government's right to control curriculum, including the right to micro-manage classroom discussion on topics the University has deemed relevant. This is contrary to numerous opinions of this Court and lower courts. *See Keyishian*, 385 U.S. at 589; *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Weiman v. Updegraff*, 344 U.S. 183 (1952); *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 1290 (1997); *Silano v. Sag Harbour*, 42 F.3d 719 (2d Cir. 1994); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Bishop v. Arnov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989).[4]

Writ of Cert. at A-6. To the contrary, the record is replete with testimony that the subject was appropriate. The syllabus for the course was reviewed by expert witnesses at trial. In addition, Dr. Edwards had previously been praised by Respondent and his department head for his syllabus. *See* Petition for Writ of Cert. at 2 n.1, 3 n.2 & 5 n.4. Further, the suggested reading list offered by Dr. Edwards was not mandatory. Dr. Edwards ordered the books so that students could review the material outside of class at their discretion to facilitate discussion in the classroom on Unit III (Bias and Censorship). *See id.* at 4 & App. D

[3] For a thorough discussion of the conflicting interests at stake in academic freedom cases see Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. L. REV. 492 (1988).

[4] These cases reflect a well-settled proposition that curriculum-related speech by teachers does implicate the First Amendment. While they do not command a particular result in this case, they stand in direct contradiction to the Third Circuit's "per se" rule that professor has *no* First Amendment rights relating to in-class, curriculum-related speech. *See* Petition For Writ of Cert. at A-6. For a discussion on the numerous conflicting tests employed by the courts of appeals see *id.* at 16-21.

This Court has recognized that the academic freedom rights of the institution are not absolute when in conflict with the free speech rights of students. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). *See also Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). There is no doubt that courts can and should review decisions

The Third Circuit was unambiguous in its definition of academic freedom when it held that the "four essential freedoms' that constitute academic freedom have been described as a university's freedom to choose 'who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Petition for Writ of Cert. at A-8. Unfortunately, this definition recognizes only one of many components that comprise the concept of academic freedom. The court of appeals' reliance solely on the "university's freedom" is misplaced. This Court has stated that academic freedom has been commonly understood as "the principle that *individual instructors* are at liberty to teach that which they deem to be appropriate in the exercise of *their* professional judgment." *Edwards v. Aguilard*, 482 U.S. 578, 585 n.6 (1987) (emphasis added).[5] Thus, at the very least, it can be argued that academic freedom includes the right of both universities *and* professors to be free from laws or policies that "cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.[6]

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of universities to ensure that accepted academic norms are followed and professional judgment is exercised. *See id.* at 225. This Court has never determined that a university has unbridled discretion with regard to decisions affecting students or professors. To the contrary, this Court has held that academic freedom does apply to individual professors. *See Healy v. James*, 408 U.S. 169 (1972). *See also Keyishian*, 385 U.S. at 589; *Sweezy*, 354 U.S. at 234; *Wieman*, 344 U.S. at 183.

[5] In *Edwards* the Court affirmed the use of this definition as conclusive evidence that the purpose underlying the act in question was a sham. 482 U.S. at 584-5. The fact that *Edwards* was in a secondary school setting even bolsters the point. Academic freedom has always been more limited in public secondary schools than in colleges and universities. *See id.* Thus, if the Court endorsed this definition of academic freedom applicable at the secondary school level, a definition appropriate at the University level must be at least as protective.

[6] The Seventh Circuit has noted the conflicting uses of the term "academic freedom" by stating:

> "It [academic freedom] is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict."

Amici implore this Court to reject the newly discovered narrow version of academic freedom put forth by the court of appeals and seize this opportunity to restore the traditional concept of academic freedom by striking a balance between the rights of the university and individual.[7] This result will preserve the University as a genuine marketplace of ideas, which is the purpose for which the concept of academic freedom was originally designed to secure.[8]

B. The Court should grant the petition in order to distinguish between the University's right to choose courses and shape curriculum, and the professor's freedom to interact with students and the curriculum within the general guidelines set by the University.

The chief purpose of academic freedom and the "special concern of the First Amendment," *Keyishian*, 385 U.S. at 603, is that a robust exchange of ideas occurs in the classroom.[9] Thus,

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Piarowski v. Illinois Community College Dist. 515, 759 F.2d 625, 629 (7th Cir.), cert. denied, 474 U.S. 1007 (1985).

In *Piarowski*, the court of appeals wrestled with the conflict between the institution and individual. The court ruled in favor of the University. At no point, however, did the Seventh Circuit entertain the idea that as a threshold matter, the institution's academic freedom rights were absolute. To the contrary, the court of appeals spent its opinion attempting to strike a balance between the rights of the University and the professor.

[7] By calling on this Court to "strike a balance," amici do not imply that a balancing test is necessary to accomplish this goal. On the contrary, amici urge that the Court find a balance by recognizing a bright-line separating areas within the scope of university regulation, and areas subject to the professional judgment of the professor. *See infra*, note 13. *See also* Donna Prokop, *Controversial Teacher Speech: Striking a Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2533 (1993).

[8] The Court has described the University as "peculiarly the marketplace of ideas." *See Keyishian*, 385 U.S. at 603. *See also Barenblatt v. United States*, 360 U.S. 109, 112 (1959) ("[W]hen academic freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.").

[9] For academic freedom to have any substance, speech in the classroom must at minimum implicate the First Amendment. *See* J. Peter Byrne,

when a university invokes academic freedom as recognized by the First Amendment, it is essential that it be for the purpose of promoting a diversity of viewpoints. When a university invokes academic freedom as a pretext for censoring a disfavored viewpoint, it reaffirms the necessity for a standard of academic freedom that guarantees professors discretion when exploring topics within the subject matter of their courses.

The crux of the conflict between the Petitioner and Respondent lies in the wording of the Third Circuit's holding that a professor "does not have a First Amendment right to decide what will be taught in the classroom." Petition for Writ of Cert. at A-6. This language is misleading for two reasons. First, the dispute between the Petitioner and Respondent is not over what will be taught. The subject being taught was obviously approved by the University.[10] Further, it is undisputed that the topics of bias and censorship were relevant to the course. *See id.* at 2 n.1, 5 n.4 & D-2. The University did not object to the subject-matter being taught by Petitioner. The only objection made by Respondent was to Dr. Edwards' use of "doctrinaire material" "of a religious sort" in connection with the unit on bias and censorship. *Id.* at 3.

The record does not indicate that the University had any policy prohibiting professors from offering suggested reading materials on topics that are integral to a course. To the contrary, to the extent that any policy was in effect, it was exactly the opposite. The official University position stated that "[a] faculty member is entitled to freedom in the classroom in discussing his/her subject," and "faculty members are entitled to freedom in the selection of textbooks, audio/visual aids and other teaching aids." Petition for Writ of Cert at 3. The contention that Dr.

Academic Freedom: A "Special Concern" of the First Amendment, 99 YALE L.J. 251 (1989) (discussing reasons why First Amendment protection is indispensable to genuine academic freedom).

[10] Dr. Edwards regularly taught Introduction to Educational Media, which has been offered by the University since at least 1980. *See* Petition for Writ of Cert. at D-1.

Edwards' actions were in "contravention of school policy" is without merit. *See id.* at A-6.

Second, the Third Circuit opinion implies that Dr. Edwards is claiming a First Amendment right to usurp the University's undisputed authority to make administrative decisions regarding the content of curriculum. *See id.* at A-6 ("A public university professor does not have a First Amendment right *to decide what will be taught in the classroom.*") (emphasis added). This is simply not the case. There are numerous academic decisions that must be made in order to assemble information and ideas and deliver them to students in a proficient manner. These decisions range from very broad (whether to offer a course) to very narrow (what questions to ask on the final exam). The simple question posed by this case is whether at some point between the extremes the government relinquishes authority to the individual professor.[11]

For a professor to enjoy genuine academic freedom, some freedom must be retained at the classroom level. And, if the professor retains any academic freedom in the classroom, it must encompass the right to freely interact with students while discussing his subject, which includes suggesting outside reading materials relevant to his course. If this is not the case, then the Third Circuit was correct in its holding that the University may exercise absolute control of the content of each course at every level.[12] This would include the power to review and censor everything that is said or read both inside or outside

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[11] Amici suggest that in order for academic freedom to remain beneficial in practice the First Amendment must require the University to relinquish authority to the professor at some point. Fortunately for Petitioner, and this Court, in the present case Respondent has voluntarily chosen that point by voluntarily granting broad authority to its faculty in the classroom.

[12] By "level," amici mean "decision-making level" ranging from who to hire to what questions to ask on a final exam. Arguably, the University could assign a committee to review grades given by the professor and adjust them without regard to the professor's professional judgment. This scheme would certainly violate traditional academic norms. *See Regents of the Univ. of Mich.*, 474 U.S. at 225.

of the classroom by the professor and conceivably even the students.

Amici contend that the Third Circuit was mistaken. This case presents an excellent opportunity for the Court to clarify the First Amendment principle of academic freedom that, while reinforcing the University's traditional role as guardian of the marketplace of ideas, will foster a free exchange of ideas and viewpoints in the classroom. Amici implore the Court to take this opportunity to reject the change in law proposed by the Third Circuit and continue to protect both the institution's right to determine what will be taught, and the instructor's freedom to interact within those parameters.[13]

C. Alternatively, even if a university could regulate a professor's in-class comments and supplemental reading materials on university-approved topics, it may not do so solely on the basis of viewpoint.

Even if a court concluded that a university can regulate the content of a professor's comments and the selection of suggested reading materials relevant to his course, the First Amendment could not permit the public university to do so based upon viewpoint.[14] "Discrimination against speech because of its

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[13] Amici do advocate any specific test. *But see* Rachel E. Fugate, Comment, *Choppy Waters Are Forecast For Free Speech*, 26 FLA. ST. L. REV. 187, 215 (Fall 1998) (proposing a new test to be used in academic freedom cases). Amici do suggest that traditional academic norms, including policies and definitions set forth in the 1940 *Statement On Academic Freedom and Tenure*, [hereinafter 1940 *Statement*] would be a solid foundation on which to construct a principled standard. *See McConnell v. Howard Univ.*, 818 F.2d 58, 64 n.7 (D.C. Cir. 1987) (citing numerous cases that rely significantly on the 1940 *Statement*). *See also* Irwin H. Polishook, *Academic Freedom and Academic Contexts*, 15 PACE L. REV. 141 (1994) (noting that academic freedom is recognized in university manuals and faculty handbooks and incorporated into union contracts for academic faculty throughout the country).

[14] Respondent's approach is tantamount to a university deciding to offer a course on the Fourteenth Amendment, approving a syllabus which includes a section on privacy rights, allowing a professor to devote a lecture to *Griswold v. Connecticut*, then prohibiting the professor from discussing the dissenting opinions written in that case.

message is presumed to be unconstitutional." *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 828-29 (1995) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 635 (1994)).[15]

The Court in *Rosenberger* held that a university's decision to deny funds to a student newspaper with religious content while approving funds for newspapers with dissimilar viewpoints violated the First Amendment. *See* 515 U.S. at 837. The dissent argued that so long as many viewpoints were silenced, no viewpoint discrimination was committed and, thus the First Amendment was not violated. *See Rosenberger*, 515 U.S. at 863 (Souter, J., dissenting). Respondent's actions in this case fail to meet either standard. The University did not instruct Dr. Edwards to "cease and desist" from discussing a variety of viewpoints concerning bias and censorship. Respondent simply ordered him to refrain from discussing his subject from a religious viewpoint.

The University went one step further. In addition to the ban on in-class comments from a religious perspective, it prohibited Dr. Edwards from suggesting outside reading materials written from a religious viewpoint. Respondent even canceled Dr. Edwards order for all books written from the

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[15] Even if the University could exclude general subject matter from a course regardless of its relevance or importance, it may not approve inclusion of a topic and then suppress particular viewpoints. "When the government targets not subject matter but particular views taken by speakers on a subject, the violation is all the more blatant" *Rosenberger*, 515 U.S. at 829 (citing *R. A. V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)). The holding in *Rosenberger* narrows the inquiry to two questions: Does the professor speak as the University or as a private speaker?; and, did the University commit viewpoint-based discrimination? *See* 515 U.S. at 834.

Here, the University would have to argue that its written policy did not intend to promote a diversity of viewpoints in its classes, and thus the University acted as "government speaker" when it censored Dr. Edwards' use of extra-curricular materials based upon one particular viewpoint. Both traditional academic norms and the University's own academic freedom policy demonstrates that the opposite is true in both instances.

disfavored viewpoint. Thus, the University's notion of academic freedom encompasses the absolute right to censor a professor's curriculum-related comments inside the classroom, as well as which viewpoints are appropriate for students to survey outside the classroom.

The Court has made it clear in the case of public secondary schools that, even when an institution has broad discretion over what is read or taught in the classroom, it may not limit the sphere of information available outside the classroom. *See Board of Educ., Island Trees Union Free Sch. Dist. v. Pico* 457 U.S. 853 (1982). *See also Griswold v. Connecticut*, 381 U.S. 479, 482 ("[T]he State may not, consistent with the spirit of the First Amendment, contract the spectrum of available knowledge.") If middle and high school aged children have the right to access to a variety of viewpoints (even over the objections of parents and the school board), then certainly college-aged adults of much more maturity have the right to access materials representing a variety of viewpoints on topics the University has deemed relevant to a course it voluntarily chose to offer.[16]

By restricting Dr. Edwards' comments solely because of their alleged religious viewpoint, Respondent's actions transgress the most fundamental principle of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 95 (1972). The Court has recognized that a public university is a "traditional sphere of free expression." *Keyishian*, 385 U.S.

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[16] Amici do not intend to suggest that a university must supply students with materials from all available viewpoints. However, if the common practice is to acquiesce to faculty requests when purchasing supplemental reading materials, it cannot violate that practice simply because it disfavors a particular viewpoint. Certainly, a university may make an administrative decision not to purchase certain books for its library based on a variety of reasons that comport with the Constitution. However, amici believe this case more closely resembles a removal of books than an initial decision not to purchase them.

at 605. the University classroom should be regarded as the core of free expression on college campuses.[17] Since the Court refers to universities as "peculiarly the marketplace of ideas", the University classroom should not be stripped of its all-important status because "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation." *Sweezy*, 354 U.S. at 250.[18]

II. THE IN-CLASS COMMENTS AND SUGGESTED LITERATURE OF A PROFESSOR AT A PUBLIC UNIVERSITY CANNOT BE CONSTRUED AS GOVERNMENT SPEECH WHEN THE SPEECH IS MADE AND LITERATURE IS OFFERED WHILE INTERACTING WITH STUDENTS AND UNIVERSITY-APPROVED CURRICULUM, AND THE UNIVERSITY HAS GUARANTEED ACADEMIC FREEDOM TO ITS FACULTY UNDER A COLLECTIVE BARGAINING AGREEMENT

A. The University, as expressed by the collective bargaining agreement, makes clear that a professor

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[17] Amici do not attempt to downplay the value of free speech on college campuses outside the classroom. On the contrary, the academic freedom of institutions, professors, and students in all facets of university life is indispensable to a healthy marketplace of ideas. Still, the term "academic freedom" by its very definition refers to the academic process which occurs for the most part in the classroom. *See* Matthew Finkin, *Intramural Speech, Academic Freedom and the First Amendment*, 66 TEX. L. REV. 1323 (1988).

[18] This Court's admonishment in *Rosenberger* is ominously appropriate in this case:

> Vital First Amendment principles are at stake here. The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based upon some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition.

515 U.S., at 835.

> does not speak for the university when making in-class comments or utilizing supplemental teaching aids relevant to topics within university-approved curriculum.

The Third Circuit incorrectly concluded that Dr. Edwards' in-class speech and selection of extracurricular reading materials was attributable to the University. The Respondent specifically contradicted that position when it declared in writing that when professors teach "they are not speaking for the university." AMERICAN ASSOC. OF UNIVERSITY PROFESSORS (AAUP), 1940 *Statement on Academic Freedom and Tenure* in AAUP, *Policy Documents and Reports* 3, 4 (1990) [hereinafter 1940 *Statement*]. As the basis for its conclusion, the Third Circuit relied on a passage from *Rosenberger* which reads: "[W]hen the State is the speaker, it may make content-based choices. When the University determines the content of the education it provides, it is the University speaking . . . ." 515 U.S. at 833-34. The Court went on to state in *Rosenberger*, however, that when a university "expends funds to encourage a diversity of viewpoints" it may not discriminate based upon viewpoint. *Id.*

For the Third Circuit's holding to pass muster it must follow that a professor's in-class speech and suggested reading lists should be taken as directly and deliberately representative of the school. This conclusion is inconsistent with the University's stated policy, as well as the premises and traditions of American higher education. Respondent acknowledged that it is governed by a written collective bargaining agreement (CBA) adopting the 1940 *Statement*.[19] *See* Petition for Writ of Cert. at 3. Respondent's adherence to the CBA clearly demonstrates the nature of the speaker. The CBA, adopting the 1940 *Statement*, states: "[B]ecause the public may judge their profession and their institution by their utterances the college or university

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[19] For a thorough discussion of the 1940 *Statement* see *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, William W. Van Alstyne, ed., LAW & CONTEMP. PROBS., Summer 1990, at 1. (includes nine articles on academic freedom with emphasis on AAUP policy).

teacher should . . .make every effort to indicate that they are not speaking for the university." 1940 *Statement* at 3. Thus, whatever argument that could be made that a professor speaks for the University in these circumstances is obliterated by the University's own specific written policy. *See* Petition for Writ of Cert. at 3.[20]

It is also important to note that students understand that professors are not expected to read from university-approved scripts. Professors must be able to express viewpoints on topics relevant to their courses as well as respond to viewpoints expressed by students. Professors must also answer questions extemporaneously. Under the Respondent's concept of academic freedom, it would be acceptable to require professors to submit class notes and lecture materials for approval from the University or require students to submit questions to professors before class in order for the professor to prepare a response and gain approval from the University before being allowed to answer.[21]

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[20] The Court has wisely recognized that college students are sufficiently mature to disassociate the speech of individuals from the position of the university. *See Widmar* v. *Vincent* 454 U.S. 263, 274 n.14 (1981); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971). *Cf. Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (same factors also true of high school students). Although the Third Circuit disagrees, the University policy regarding the freedom of its faculty demonstrates that it does not view them as "mere government actors paid to articulate a specific government position" as in *Rust v. Sullivan*, 500 U.S. 173 (1991). Petition for Writ of Cert. at 26. To the contrary, the University went out of its way to voluntarily grant virtually unbridled discretion in all areas of instruction. *See id.* at 3-7. Clearly, the University intended to promote a "diversity of views" within the classroom and among its faculty, and adopted policies to that end. *See id.* at 26.

[21] Further, if a university can censor a professor's in-class comments relating to his subject, and suggested reading lists outside of class, what about discussions with students in his office during office hours? Outside of office hours? It is obvious that the Third Circuit's holding is incompatible with academic freedom as it has been traditionally defined, as well as the First Amendment. *See Keyishian*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. That freedom is therefore a special concern of the First

Moreover, the court of appeals' reasoning and result ultimately would place universities themselves under immense pressure. If professors are deemed to speak for the University, and the University fails to censor what is said on its behalf, then the University could be held to have endorsed the speech. If this is the case, not only do universities endorse a wide variety of sometimes incompatible positions on various issues, they can expect constant pressure from within and without to engage in viewpoint censorship in a host of individual cases. As President Lowell of Harvard University stated in a famous speech during World War I, resisting pressure from alumni to dismiss a pro-German professor:

> If a university or college censors what its professors may say, if it restrains them from uttering something that it does not approve, it thereby assumes responsibility for that which it permits them to say. This is logical and inevitable, but it is a responsibility which an institution of learning would be very unwise in assuming.

Lowell, *A Lawrence Lowell on Academic Freedom in Wartime*, in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 879 (R. Hofstader & W. Smith eds. 1961).

Even absent an established policy guaranteeing academic freedom to its professors, the court of appeals' conclusion that a professor speaks as the university when making in-class comments or suggesting out-of-class reference materials relating to university-approved topics evaporates under the most minimal scrutiny. Students understand that professors have individual viewpoints on matters relating to their subjects. Fellow professors are aware that each individual fellow faculty member is not a mouthpiece for the University's official position. In this case, according to the CBA, the University is unambiguous in its expectation that its professors make clear that they do not speak for the University.

Amendment, which does not tolerate laws that cast a shadow of orthodoxy over the classroom.")

It seems the court of appeals is the only group under the mistaken impression that a professor's interaction with approved curriculum through in-class comments and supplemental teaching aids is government speech. The traditional understanding of a professors' academic freedom in the classroom, and the specific written policy of the University dictates otherwise. The court of appeals should be corrected in this case because "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

B. The University, through it adoption of the collective bargaining agreement, grants broad discretion to its faculty to express viewpoints and utilize supplemental materials on matters relevant to their courses.

Even if, under normal circumstances, a university reserves the right to put content-based or viewpoint-based restrictions on a professor's in-class speech and suggested reference materials, Respondent has waived that right by adopting a collective bargaining agreement that guarantees academic freedom to its faculty. At the heart of the dispute between Dr. Edwards and the University is the portion of the CBA which states in pertinent part: "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject." Petition for Writ of Cert. at 3. As discussed earlier, Respondent did not contend that the comments or materials had no relation to the subject. *See id.* at 3. It is conceivable, however unlikely, that due to the single complaint lodged by one student, who did not testify at trial, Respondent might argue that the material was "controversial." But even so, under the CBA, the material must bear "no relation to [the] subject" before a professor is expected to refrain from including it. *See id.* at A-3.

Furthermore, to even suggest that avoiding controversy is a sufficient interest to justify viewpoint-based discrimination strains credulity. For "school officials to justify prohibition of a particular expression of opinion, [the school] must be able to

show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969).[22] To hold as the court of appeals did, that a viewpoint may be singled out because it alone has produced a student complaint, strikes at the very heart of the First Amendment.

It is unclear why the Third Circuit failed to even mention the CBA in its opinion.[23] *See* Petition for Writ of Cert. at 3 n.2. Despite this conspicuous omission, amici suggest that the CBA states the University's unequivocal intention as to the nature of the classroom and the speaker. The University could not have been more clear when it declared that faculty members have "extraordinary latitude" in decisions regarding whether certain materials are relevant to a course. *See id.* at 3. It stands to

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[22] This Court has made it clear that the First Amendment will not countenance a "heckler's veto":

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling affects as it presses for acceptance of an idea. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to a standardization of ideas.

Terminello v. City of Chicago, 337 U.S. 1, 4 (1949).

[23] The University's adoption of the CBA undoubtedly has a transforming effect. This Court has noted that adoption of the 1940 *Statement* by a sectarian institution supports the conclusion that the school was "characterized by an atmosphere of academic freedom rather than religious indoctrination." *Tilton v. Richardson*, 403 U.S. 672, 681-2 (1971). And the fact that "[e]ach college subscribes to, and abides by, the 1940 *Statement* . . ." demonstrates that the Catholic colleges receiving an annual state subsidy were not pervasively sectarian. *Roemer v. Board of Public Works of Md.*, 462 U.S. 736, 756 (1976). *See also Minnesota Higher Educ. Facilities Auth. v. Hawk*, 232 N.W.2d 106, 109 (Minn. 1975) (holding that private colleges benefitting from tax-exempt revenue were non-sectarian because "the colleges all adhere to the 1940 *Statement* . . .")

reason that students enjoy at least as much "freedom in learning" as professors do "freedom in teaching" as espoused in the CBA. Thus, the University has unavowedly declared its classrooms an arena intended for the open exchange of viewpoints between professors and students.

The Third Circuit's opinion omitting any reference to the University's defiance of the CBA warrants review and reversal.

C. When a public university grants broad academic freedom rights to its faculty, it may not selectively revoke that grant based upon the viewpoint being expressed.

While there is considerable scholarship on the subject of academic freedom, both in theory, and under the Constitution, there appears to be little or no scholarship discussing a public university's selective revocation of a prior delegation of academic freedom.[24] Admittedly, there is some debate regarding whether a university must delegate some authority over academic decisions to its faculty. It does not follow, however, that if a university is not required to delegate, it has absolute discretion in revoking any delegations made prior. *See* Petition for Writ of Cert. at 27.

The University's actions in this case are analogous to the school board's actions in *Pico*. 457 U.S. at 853. While the books at issue in this case had not yet been purchased, nor placed in the library, they had been ordered. *See* Petition for Writ of Cert. at 5. The University had a longstanding policy of granting the requests of faculty members for supplemental class materials. *See id.* In addition, the CBA states that "faculty members are entitled to freedom in the selection of textbooks, audio/visual aids and other teaching aids." *Id.* at 3.

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[24] *See e.g.*, Nathan Glazer, *Academic Freedom in the 1990's*, 22 WM. MITCHELL L. REV. 479 (1996); Gregory A. Clarick, *Public School Teachers and The First Amendment: Protecting The Right To Teach*, 65 N.Y.U. L. REV. 693 (June 1990); *The Academy and the Courts: A Symposium On Academic Freedom*, 16 U.C. DAVIS L. REV. (Summer 1983) (compilation of seven articles each addressing a different aspect of academic freedom).

Nevertheless, upon receipt of a single complaint by one student, who did not testify at trial, the University ordered Dr. Edwards to "cease and desist" from employing twenty-four titles of "suspect materials" in the teaching of his class. Petition for Writ of Cert. at 4. The Court held in *Pico* that despite the significant interests of parents and the school board, the school board was prohibited from removing the books. 457 U.S. at 853. While the University may be free to approve or disapprove which books it buys for its library or what materials it orders for its bookstore, this administrative authority, necessitated by a scarcity of resources, does not include the power to restrict Dr. Edwards from offering a list of books as suggested reading on the topic of bias and censorship because of their viewpoint.[25]

The only conclusion one can draw from the University's actions is that it revoked the academic freedom it had delegated to Dr. Edwards through the CBA. There is no other evidence that the University intended to terminate its adherence to the CBA as to any other professor. Therefore, it can be deduced that the University intended to continue its adherence to the CBA except as to Petitioner. Like the University in *Rosenberger*, Respondent defied its specific written policy in order to suppress one viewpoint from one speaker. 515 U.S. at 819. The only explanation for this selective discrimination was that the Respondent wished to censor one of the viewpoints being expressed in Dr. Edwards' class. *See* Petition for Writ of Cert. at 3-6.

A government ban of books based upon a single objection by an alleged student to the viewpoint of the books is inconsistent with the First Amendment and harmful to the intellectual freedom necessary to sustain a free society.

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[25] Respondent did not simply invoke its administrative authority and refuse to allocate resources for Dr. Edwards' book order (though this action would also be suspect under the First Amendment if done solely on the basis of viewpoint). Respondent also prohibited Dr. Edwards from utilizing or suggesting any of the materials in discussing his subject even, arguably, if he purchased the books himself and placed copies on reserve in the library for student examination.

Freedom is abridged by those who object to a particular viewpoint "each ripping a page from this book, then that, until the day came when the books were empty and the minds were shut and the libraries closed forever." RAY BRADBURY, FAHRENHEIT 451 149 (Ballantine Books 1979) (1953).

Selective academic freedom is an oxymoron. If the University reserves the right to revoke the CBA at will, and only as to one professor or one viewpoint, then academic freedom under the CBA is a sham. *See Edwards v. Aguilard* 482 U.S. 578 (1987) (holding that statute that limited a teacher's discretion was antithetical to the statute's stated purpose of academic freedom). The University's own "primary guiding document" belies its arguments in the lower courts.

Accordingly, amici strongly urge this Court to reaffirm the Constitution, more specifically the First Amendment, as the "primary guiding document" to carry out its most basic function- to guarantee an unrestricted marketplace of ideas- and restore academic freedom to a position worthy of the American system of higher education.

CONCLUSION

For the foregoing reasons the Court should grant the Petition For Writ Of Certiorari.

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January 13, 1999